NO. 91-68

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROMAN A. GROCHOWSKI

Petitioner,

v.

T. S. DEWITT-RICKARDS

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI

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Counsel of Record

THE QUESTIONS PRESENTED FOR REVIEW

I

THE GENERAL ASSEMBLY OF VIRGINIA ENACTED INTO ITS DRIVING UNDER THE INFLUENCE OF ALCOHOL STATUTORY SCHEME PURSUANT TO VIRGINIA CODE §18.2-267(c) THAT ITS CITIZENS SHALL HAVE A RIGHT TO REFUSE TO PERMIT HIS OR HER BREATH TO BE ANALYZED AND FURTHER PROVIDED A MANDATORY STATUTORY PROCESS TO EFFECT THE REFUSAL INTO A CIVIL PENALTY CHARGE TO BE TRIED AS TO THE REASONABLENESS OF SUCH REFUSAL AND A PROCESS TO DEAL WITH THE REFUSING CITIZEN BEFORE A MAGISTRATE UNDER VIRGINIA CODE §18.2-268(e); THIS PROCESS BY ITS LEGISLATED PURPOSE IS ENACTED TO AVOID VIOLENT CONFRONTATION BETWEEN CITIZENS AND THE POLICE AND TO PRESERVE THE DIGNITY AND LIBERTIES OF THE PERSON: DOES THE DENIAL BY STATE ACTORS OF THIS LEGISLATED PROCESS WHICH MISAPPLICATION OF SAID STATUTORY SYSTEM GAVE RISE TO ACTS OF VIOLENCE RESERVED FOR CONSTITUTIONAL DECISION IN SCHMERBER V.

CALIFORNIA, 384 U.S. 757 (1966) VIOLATE AN AMERICAN CITIZEN'S FOURTH AND FIFTH AMENDMENTS RIGHTS BY COERCING WITH VIOLENCE THE GATHERING OF EVIDENCE BY THE POLICE FOR A CONVICTION UNDER VIRGINIA PENAL CODE §18.2-266.

II.

WAS THE DENIAL BY A STATE ACTOR, THE RESPONDENT, OF THE NON-VIOLENT STATUTORY SCHEME AS TO ROMAN A. GROCHOWSKI RESERVED BY THE STATE LEGISLATURE A VIOLATION OF HIS DUE PROCESS RIGHTS PROCEDURALLY AND SUBSTANTIVELY UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION ACTIONABLE UNDER 42 U.S.C. §1983 DUE TO ACTS OF VIOLENCE BY THE POLICEMAN FAILING TO UTILIZE THE MANDATED NON-VIOLENT STATE STATUTORY SCHEME FOR SUSPECTED DUI DRIVERS PLACE IN CUSTODY.

PARTIES TO THE PROCEEDINGS

IN THE COURT BELOW

The Petitioner is Roman A. Grochowski who resides in Charlottesville, Virginia.

The Respondent is Officer DeWitt-Rickards who resides in Charlottesville, Virginia.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The Petitioner, Roman A. Grochowski, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 13, 1991.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit and United States District Court for the Western District is set out in the Petition Appendix annexed hereto.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed is dated and was entered March 13, 1991, page 3-17of the Petition Appendix.

Grochowski's Petition to Rehear with a Suggestion En Banc was denied by order dated April 5, 1991, Petition Appendix, Pages 1-2.

Title 28 United States Code, Section 1284(1) confers jurisdiction to review the judgment by writ of certiorari.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

[AMENDMENT IV]
[Security from Unwarrantable Search and Seizure]

The right of the people to be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[AMENDMENT V]
[Right of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in

jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[AMENDMENT XIV]

Section 1.

*** No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. 1983.
Civil Action for Deprivation of Rights

Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

Title 28 U.S.C. 1331. Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

PERTINENT VIRGINIA CODE STATUTES

VA. CODE §18.2-266. Driving motor vehicle, engine, etc., while intoxicated, etc. - It shall be unlawful for any person to drive or operate any motor vehicle, engine or train (i) while such person has a blood alcohol concentration of 0.10 percent or more by weight by volume as indicated by a chemical test administered in accordance with the provisions of §18.2-268, or (ii) while such person is under the influence of alcohol, or (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature. For the purposes of this section, the term "motor vehicle" shall include mopeds, while operated on the public highways of this Commonwealth (Code 1950, §18.1-54; 1960, c. 358; 1975, cc. 14, 15; 1977, c. 637; 1984, c. 666; 1986, c. 635.) (Note law in effect for year of 1987.)

VA CODE §18.2-267. Analysis of breath to determine alcoholic content of any person who has been stopped by a police officer of the Commonwealth, or of any county, city or town, or by any member of a sheriff's department and is suspected by such officer to be guilty of a violation of §18.2-266, shall have the right to refuse to permit his breath to be so analyzed, and his failure to permit such analysis shall not be evidence in any prosecution under §18.2-266, provided, however, that nothing in this section shall be construed as limiting in any manner the provisions of §18.2-268.

VA CODE §18.2-268. Use of chemical test to determine alcoholic content of blood; procedure; qualifications and liability of person withdrawing blood; costs; evidence,

suspension of license for refusal to submit to test; localities authorized to adopt parallel provisions. If a person after being arrested for a violation of §18.2-266 or of a similar ordinance of any county, city or town and after having been advised by the arresting officer that a person who operates a motor vehicle upon a public highway in this Commonwealth shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood or breath taken for a chemical test to determine the alcoholic content of his blood, and that the unreasonable refusal to do so constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of this Commonwealth, then refuses to permit the taking of a sample of his blood or breath for such tests, the arresting officer shall take the person arrested before a committing magistrate. If he again so refuses after having been further advised by such magistrate of the law requiring a blood or breath test to be taken and the penalty for refusal, and so declares again his refusal in writing upon a form provided by the Division of Consolidated Laboratory Services (hereinafter referred to as Division), or refuses or fails to so declare in writing and such fact is certified as prescribed in subsection (j), then no blood or breath sample shall be taken even though he may thereafter request same.

STATEMENT OF THE CASE

Roman A. Grochowski is a citizen of the United States residing in Charlottesville, Virginia and at the time of the incident with local police authorities in 1987 he had been an on and off student at the University of Virginia working his way to pay for a college degree taking time off intermittedly to finance his tuition and books.

On August 24, 1987, he and friends gathered to celebrtae his birthday. He consumed mineral water for the evening in a local restaurant. Near closing because he had not consumed alcohol, he was asked to drive home a lady who had consumed too much. Mr. Grochowski accommodated management for whom he worked as a bartender as a favor to management and took the lady home.

At her home, the lady insisted he take a shot of Vodka which she stored

in her freezer demanding he at least celebrate his birthday by having one drink with her. In doing so to facilitate his desire to get away quickly and back to his friends, he consumed one shot with the lady, thanked her and went out the door. Fearful he might lose his friends waiting for him, he admitted in his state trial on a DUI charge that he likely exceeded the speed limit. His car caught the attention of a police cruiser operated by Respondent Police Officer T.S. Dewitt-Richards.

In a controversial arrest scene at the restaurant parking lot only blocks away from the lady's home on the officer's arrival, smelling the odor of alcohol, Grochowski was commanded by the officer who called in back-up officers to take field sobriety tests and by eyewitnesses' account was seen as performing the dexterity tests as stable and fine. Grochowski irritated by the officer's demeanor and asserted failure

to advise him of his rights as to the officer's demand that he take a field breathalyzer (which advice of rights Grochowski was by the Virginia statutory scheme entitle to receive) and the officer, irritated with the crowd watching and Grochowski's questions, announced at the scene that he took all of the same to be a refusal, quickly cuffed him to the rear and arrested him for driving under the influence in violation of Virginia Code § 18.2-266. Grochowski asked to relieve himslf having consumed mineral water and one shot of Vodka. His request was refused and he was put in the police car and driven to the University of Virginia Police stationhouse where a breathalyzer testor was to be in place for a test.

At the stationhouse, Grochowski fell getting out of the car while cuffed from behind and having urinated on himself due to the officer's refusal to let him

relieve himself before being carted off the scene, he injured his head. The head injury was confirmed the next day as a mild concussion by a medical doctor or Grochowski getting out of jail and going to the hospital with a headache.

At the stationhouse, he was forced to sit in a chair cuffed from behind to wait for the Smith and Wesson Breathalyzer to warm up for the test. Grochowski announced he did not want the test and wanted to be taken to the hospital where he would submit to a blood test and be treated for his head injury that was now painful. His requests were refused. He then asked for a lawyer and this request was refused.

Finally Officer Dewitt-Rickards with the assistance of two other officers of the University Police Department stationhouse where the breath test was to be performed, forcefully took Grochowski against his will to the wood housing of

the breathalyzer which had a wooden lid and encased the machine. Holding him to each of his sides and rear, the officers forcefully commanded he take the test where a scuffle ensued and in that process the lid of the breathalyzer kept coming down on Grochowski's head and he was being yelled at to "blow, blow, blow". The test result was marginally over the legal limit.

Grochowski was later convicted of the DUI charge with the state court holding the test was voluntary. He had tried to suppress this disputed breath test certificate that a medical doctor claimed at the state DUI trial to be medically impossible and that his state right of refusal was not voluntarily made due to having been coerced by force and violence at the station house. In the Virginia Court of Appeals on appeal he tried to argue that his state right against self-incrimination was violated and the Court refused argument and held it did not

apply.

In his Complaint in the United States District Court for the Western District of Virginia at Charlottesville, Virginia, Grochowski asserted constitutional deprivations under the Fourth, Fifth and Fourteenth Amendments as a result of the mishap, viz., that his person had been unlawfully seized to force a coerced breath test by violence initiated by the police in the stationhouse under custodial arrest, that with the violence coercing his breathalyzer, he was denied his right to refuse and also denied statutory procedures all guaranteed to him by the Virginia General Assembly codified in the Virginia penal code (Va. Code § 18.2-267(c) and §18.2268(e)) and the state actor thereby denied him his liberties, due process rights procedurally and substantive due process rights, equal protection under the law, and that due to the violence initiated by the police, that

a Fifth Amendment right attached to the coerced breathalyzer test.

Grochowski relys on the reservation by this Court (South Dakota v. Neville 459 U.S. 553 (1982), and as reserved in Schmerber v. California 384 U.S. 757 at n. 9 at page 765, (1966))) to decide Fourth and Fifth Amendment issues when violence initiated by the police occurs in a DUI arrest which otherwise confers no constitutional rights. He also asserts independently, that he was treated differently than others are treated under the state statutory scheme and was denied state procedures that would have easily avoided the violence inflicted by merely taking him to the magistrate where he could be informed of the penalty for refusal and be booked separately for a refusal as well as for an alleged DUI.

In defense, respondent Dewitt-Rickards asserted affirmative defenses

of collateral estoppel and reciting the Rooker- Feldman doctrine. (Rooker v. Fidelity Trust Co. 263 U.S. 413 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 483 n.16, (1983). The District Court in granting the respondent's motion to dismiss held the Rooker-Feldman defense did not apply and granted the affirmative defense of collateral estoppel.

(Order and Opinion dated July 18, 1990, See Petition Appendix pgs 18 to 37 .) The United States Court of Appeal for the Fourth Circuit in an unpublished opinion dated March 13, 1991 (Petition Appendix pgs 3 to 17) held that collateral estoppel did not apply, but based on the record below, summary judgment was proper because the events and acts of the police did not compare to the methods of "thumb and screw" tactics relying on Rochin v. California, 342 U.S. 165, 172 (1952) which by the standards therein stated did not in Grochowski's case "shock

the conscience". Grochowski filed a Petition to Rehear En Banc which was denied April 5, 1991. (See Petition Appendix pg. 1-2.)

BASIS FOR JURISDICTION OF UNITED STATES DISTRICT COURT

Jurisdiction was invoked under 28 U.S.C. 1331 and 42 U.S.C. § 1983, and inter alia, alleged violations of Grochowski's Fourth, Fifth, and Fourteenth Amendments of the Constitution of the United States.

REASONS FOR ALLOWANCE OF THE WRIT

The decision of the Fourth Circuit Panel is that this case of intentional deprivation of constitutional rights is decided without oral argument below and without trial because Dewitt-Rickards is entitled to summary judgment on the merits of Grochowski's claims. (Petition Appendix, Non-published Opinion dated March 13, 1991, before Murnaghan, Sprouce, and Chapman,

Circuit Judges.) We submit to this Court that a writ should issue toward the ends of justice to determine if Grochowski is entitled to a trial for constitutional violations and to clarify misunderstandings of controverted facts and to urge upon this Court that the wrong standard of review as to excessive force has been used below to decide this case.

Grochowski requests this Court hear his case by granting a writ to resolve the conflict between the U. S. Fourth Circuit and the United States Supreme Court. The United States Supreme Court framed the issue in favor of Grochowski, South Dakota v. Neville 459 U. S. at 559 at footnote 9, Justice O'Connor for the Court (Justice Brennan, White, Blackman, Powell and Relinquist joining the majority.)

> Schmerber did caution that due process concerns could be involved if the police initiated physical violence while administering the test, refused to respect a reasonable request to undergo

> a different form of testing, or responded to resistance with inappropriate force.

Further The South Dakota Court reasoned (Id. 559 - 560):

> The situations arising from a refusal present a difficult gradation from a person who indicates refusal by complete inaction, to one who nods his head negatively, to one who states 'I refuse to take the test', to the respondent here, who stated 'I'm too drunk, I won't pass the test.' Since no impermissible coercion is involved ... we prefer to rest our decision on this ground, and draw possible distinctions when necessary for decision in other circumstances.

The inappropriate force used on Grochowski stemmed from his station house arrival condition, viz., he fell getting out of the police car with no assistance, handcuffed from behind, and falling struck his forehead on an asphalt pavement, Officer Rickards testifying he put his foot out to deflect the impact of the fall and nothing more.

Injured, certified as a concussion by a physician who testified at the state

criminal trial, who examined him once he got out of lock-up the next morning, he was, in that physical demise, dragged to a breathalyzer machine and held to either side, and, to the rear by officers while handcuffed from behind, then with the lid of the housing to the Smith and Wesson breathalyzer banging repeatedly down on his head, he was **compelled** to "blow, blow, blow." All will to resist and to refuse by the physical drama unfolding at all times in the arrest process vitiated any voluntariness on the part of Grochowski and by the naked facts, totally refutes the ill logic of the state and its actors that Grochowski gave a voluntary breath test that he had an abolute state right to refuse.

The Fourth Circuit panel felt these events were mere discomfort and not the methods of "thumb and screw". Certainly summary judgment in the context of these

facts is error but as a matter of constitutional law, the acts and omissions by the state and its actors would shock the conscience of any reasonable man or woman and miscontruing a convoluted set of facts, to any Court it should under the circumstances present a jury issue factually.

> "As we stated in Fisher v. United States 425 U.S. 391, 397 (1976) '[the] Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of physical force or moral compulsion exerted on the person exerting the privilege.' This coercion requirement comes directly from the constitutional language directing that no person 'shall be compelled in any criminal case to be a witness against himself." (South Dakota v. Neville 459 U.S. at 562, citing United States Constitution, emphasis added by the United States Supreme Court.)

The Court is referred also to footnote 12 of South Dakota opinion where the Court in Schmerber pointed to a lie detector test merely as an example of evidence that is difficult to characterize as testimonial or real. "Even though the test

may seek to obtain physical evidence, we reasoned to compel a person to submit to such testing is to evoke the spirit and history of the Fifth Amendment". Id. fn 12.

Thus the "thumb and the screw" analysis, as well as the "shock of conscience" standard of the panel, would not by the above conclusions of the Supreme Court even apply in the given facts and circumstances where reasonable men would differ, it becomes a question for the trier of fact, and in not allowing Grochowski to have a trial, other substantive due process rights are involved, the right to trial tantamount to place the constitutional infractions factually to a trier of fact for an award of damages if reasonable men would so render a verdict in favor of Grochowski.

Moreover, the statutory scheme of Virginia DUI's law is explicit that the right of refusal is granted. "Rather, to

avoid violent confrontations, the South Dakota statute permits a suspect to refuse the test, and indeed requires police officers to inform the suspect of his right to refuse." Id at 560. Virginia's statutory scheme nearly identically mirrors South Dakota and even goes further. Every state in the nation has on their books similar laws with some states not granting the right to refuse.

Grochowski testified at his trial (Trial Transcript 237) to wit:

> "I didn't trust him by this point, what inadmissible in court meant. And he never gave me a satisfactory answer and so, he goes, look are you going to take this test or not, and I said I'm not refusing to take the test, I just want to know what my rights are and at that time, he goes, 'I'm taking that as a refusal to take the test'; he turned me around and handcuffed me."

Grochowki stated the first time his right to refuse the test was made known to him by a state official was when he told Officer Gritmon at the stationhouse he did not want to take the test due to his head

injury. (Trial Transcript)P. 246 line 3-8.

> "Then, I asked her, you know I told her again, point blank, I do not want to take this test and she goes well it's too late I've already started it and then she kind of hedged and said, well, I could, she introduced the possibility of refusal to take the test charge and I said what's that, and can you explain that to me?"

From the field to the station house, Grochowski demonstrates the statutory system in place by state legislation is being entirely ignored by the police who had physical custodial arrest. Violating the statutes as to procedural protection to enforce another law is violative of the procedural and substantive due process right and liberty rights to unreasonable seizures particularly where the state has gone beyond simple procedural guidelines, "It has used language of an unmistakably mandatory character, requiring that certain procedures 'shall ... be employed." (Bartholomew v. Clawson 594 F. Supp 1121 (1984), the District

Court citing Hewitt v. Helms 459 U.S. 460, 103 S. Ct. 864 (1983) addressing a Pennsylvania inmate's grievance to mandatory language in guidelines for administration within a state jail system.)

The Court noted that placing no official discretion on the officer, the Supreme Court opined would create a substantive due process issue and a liberty issue and here, the General Assembly of Virginia placed no discretion in the statutory scheme so recited to this Court.

While there are those who find the police activities in this case shocking, the shock the conscience standard of Rochin is the wrong standard to evaluate Grochowski's substantive due process claim of a liberty interest. The proper standard of review is whether or not the police actions impermissibly encumbered Grochowski's legislated right of refusal. In other words, if the Commonwealth of Virginia chooses

to represent to its citizens they have the right to refuse, the Commonwealth creates a due process liberty interest in the proper exercise of that right.

Therefor, a state may not unduly encumber a citizen's choice to refuse or not to refuse. This is not to say a state may not encumber the decision whatsoever. Indeed, it has been recognized that since the state grants the right of refusal it may properly encumber it with a moderate civil penalty for refusal. This is the approach taken by Virginia law with its double edged statutory scheme. It is designed to prevent violence, not encourage it.

Grochowski's resistance alone is a refusal. Forcing him to the machine, forcing him to blow, handcuffed, injured, and asking for a blood test are all real evidence of a refusal by action as well as word. (In asking for a blood test, the hospital was a two to five minutes drive

and could have been well within the two hour period allowed by law to get his blood alcohol content.)

In seizing his person to force and compel the test the Fourth Amendment also is invoked. The question is whether the officer's actions are "objectively reasonable" in the light of the facts and circumstances confronting them without underlying intent and motive. Graham v. Connor 490 U.S. ___, 104 L. Ed 2d 443, 109 S.Ct. ___, (1989). Excessive force is excessive force without regard that Grochowski changed his mind under the objective reasonableness test, not the "shock of conscience" test nor the "thumb and screw" analogy. Under Graham, Grochowski is entitled to a trial and well settled by this Court and the Fourth Circuit is that summary judgment on controverted facts is inappropriate and controverted facts exist as to the degree of excessive force utilized

by the officers under the circumstances facing them.

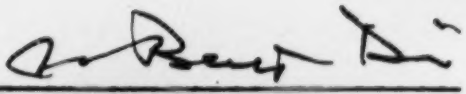
CONCLUSION

Accordingly, Roman Grochowski prays that he be awarded a writ to preserve his individual constitutional rights and to address for guidance to all fifty states the extent to which police among the several states may be prohibited on a constitutional basis from using excessive force in DUI related cases. Petitioner notes to this Court that since Prohibition, alcohol is a controlled substance widely used and which is not always abused and that citizens should be protected from the sort of violence visited upon the Petitioner.

Finally, due to the conflict between the Fourth Circuit and the United States Supreme Court as to the above, that Grochowski prays that in granting the petition for writ of certiorari, that the decision of the lower courts be reversed and his case

remanded for trial.

ROMAN A. GROCHOWSKI
By Counsel



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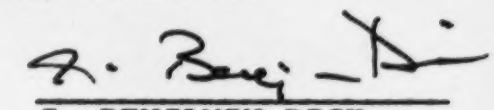
Certificate

I hereby certify that a true and correct copy of the foregoing Petition For Certiorari was mailed this 5th day of July, 1991 to Dayna B. Matthew, Esq. of McGuire, Woods, Battle & Boothe, at Court Square Building, Charlottesville, VA 22901.



J. BENJAMIN DICK

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Filed
April 5, 1991

No. 90-2159

ROMAN A. GROCHOWSKI
Plaintiff-Appellant

v.

T. S. DEWITT-RICKARDS
Defendant-Appellee

and

COMMONWEALTH OF VIRGINIA
Defendant

On Petition for Rehearing with Suggestion for Rehearing In Banc.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Sprouse and Judge Chapman.

For the Court,

JOHN M. GREACEN
Clerk

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 90-2159

ROMAN A. GROCHOWSKI,

Plaintiff-Appellant,

v.

T. S. DEWITT-RICKARDS,

Defendant-Appellee,

and

COMMONWEALTH OF VIRGINIA,

Defendant.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. James H. Michael, Jr., District Judge. (CA-89-34-C)

Submitted: February 13, 1991 Decided: March 13, 1991

Before MURNAGHAN, SPROUSE, and CHAPMAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

J. Benjamin Dick, Charlottesville, Virginia, for Appellant. Dayna Bowen Matthew, McGuire, Woods, Battle and Boothe, Charlottesville, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this Circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Roman A. Grochowski was stopped by defendant Thomas S. Dewitt-Rickards, a police officer, for probable cause to believe he was driving under the influence of alcohol. After administering a series of field sobriety tests, officer Rickards transported him to a police station where an alcohol breathalyzer test was given. The results of the test indicated that Grochowski was legally intoxicated. He was then charged and taken into custody.

Grochowski was convicted of driving under the influence of alcohol in the General District Court for the City of Charlottesville. He then appealed to the Circuit Court for the City of Charlottesville and received a trial de novo. Prior to that trial, Grochowski moved to suppress the results of the breathalyzer test on the grounds that it was tainted and forcibly coerced and that he was denied his right

under Virginia law to refuse the test. Upon review of the testimony given in the general district court trial, the circuit court judge denied the motion, concluding as a matter of law that Grochowski had not refused to take the test. After a trial on the merits of the drunk driving charge, Grochowski was convicted in the circuit court.

Grochowski filed the instant claim in the United States District Court. The complaint, brought under 42 U.S.C. §1983, alleges violations of Grochowski's fourth, fifth, and fourteenth amendment rights. The district court held that the state criminal conviction necessarily decided the issue of whether the test was validly administered and voluntary. It concluded, therefore, that Grochowski was collaterally estopped from relitigating that issue in the federal §1983 action. Since the issue of the voluntariness of the breathalyzer

was essential to the federal claim and since the state court decided the issue unfavorably to Grochowski, the district court granted defendant's motion for summary judgment.

We do not agree that the doctrine of collateral estoppel bars Grochowski's claims from going forward. However, because the evidence in the record supports summary judgment for the defendant on the merits of Grochowski's claims, the decision of the district court is affirmed.

The doctrine of collateral estoppel precludes parties and their privies in a first action from relitigating any factual issue actaully litigated and essential to that judgment in a second, subsequent action. Selected Risks Ins. Co. v. Dean, 233 Va. 260, 264, 355 S.E.2d 579, 581 (1987). According to the mandate of 28 U.S.C. §1738, federal courts are required to "give preclusive effect to state-court judgments whenever the courts of the State from which

the judgments emerged would do so." Haring v. Prosise, 462 U.S. 306, 313 91983), quoting Allen v. McCurry, 449 U.S. 90, 96 (1980).

There is no implicit exception in §1983 to the applicability of collateral estoppel to bar religitation in federal court of issues finally adjudicated in a state criminal conviction. See Haring, supra. However, there is also no exception inherent in §1983 to the mandate of §1738, requiring the use of state collateral estoppel rules.

In Haring v. Prosise, the Supreme Court interpreted Virginia law as giving preclusive effect to a state court conviction only if the constitutional issue was actually litigated and necessarily determined in the state proceeding. Haring, 462 U.S. at 315. It does not necessarily follow, however, that, merely because the issue was litigated, collateral estoppel would necessarily apply. In fact, the Supreme

Court has expressly refrained from commenting on the scope of collateral estoppel in a §1982 action when issues were litigated and decided at a criminal trial. Id. at 311 n.2; see also Allen v. McCurry, 449 U.S. at 93 n.2.

Virginia courts have long required mutuality of parties in the application of collateral estoppel. See Norfolk & Western Ry. Co. v. Bailey Lumber Co., 221 Va. 638, 640, 272 S.E.2d 217, 218 (1980). That doctrine requires that the estoppel of the judgment must be mutual; that is, "a litigant is generally prevented from invoking the preclusive force of a judgment unless he would have been bound had the prior litigation of the issue reached the opposite result." Id. It is clear that, although the modern trend is toward abrogation of the mutuality requirement, Virginia courts have held steadfast to the doctrine.

> For at least 118 years, [the Supreme Court of Virginia], in dealing with the preclusive effect of a criminal judgment upon a subsequent civil action arising from the same transaction, has recognized that the criminal charge and the civil action, "though founded on the same facts, are distinct remedies, prosecuted by different parties and for different purposes," and that there is a "want of mutuality." ... The reasons for the rule "that a judgment rendered is a criminal prosecution, whether of conviction or acquittal, does not establish in a subsequent civil action the truth of the facts on which it is rendered." ... have also been articulated as follows: "(1) The parties are different in a criminal proceeding from those in a civil action; (2) the objects of the two proceedings are different; (3) the results and procedures of the two trials are different; and (4) there is a lack of mutuality." ...

Selected Risks, 233 Va. at 263-64, 355 E.S. 2d at 580-81 (citations omitted).

Because the Virginia Courts have held on the requirement of mutuality, and

since they have declined to find mutuality existing between criminal and civil suits, the district court improperly applied the doctrine of collateral estoppel to this case.

Although collateral estoppel does not bar Grochowski's suit, the record before the district court sufficiently establishes that Dewitt-Rickards is entitled to summary judgment on the merits of Grochowski's claims. In reaching this conclusion, we have, as we must, resolved all factual disputes in Grochowski's favor. See Cole v. Cole, 633 F.2d 1083, 1092 (4th Cir. 1980).

The Supreme Court, while upholding the reasonable use of tests to determine blood-alcohol content against fourth and fifth amendment claims, has left open the question of redress for constitutional claims involving the use of such tests accompanied by police-initiated force or violence, or administered with disregard for reasonable

refusals to submit to the tests. See Schmerber v. California, 384 U.S. 757, 760 n.4, 768 (1966); South Dakotav. Neville, 459 U.S. 553, 559 n.9 (1983). Although the Court did not discuss the nature of the allegations necessary to support such a claim, it is clear in this case that Dewitt-Rickards' conduct during the administration of the breathalyzer test, as described in Grochowski's testimony in state court, does not present the factual scenario needed to support such a constitutional claim. The minor force used by Officer Rickards may, perhaps, "offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically." Rochin v. California, 342 U.S. 165, 172 (1952). However, it is not conduct that "shocks the conscience," nor were the methods used "too close to the

rack and screw." Id. * The conduct addressed in Rochin involved the forcible extraction of evidence from the Plaintiff's stomach. The Court held that such conduct did violate due process. However, the standard it established requires more than minor discomfort on the part of the complaining party.

To the extent that Grochowski's claim is based on Dewitt-Rickards' alleged disregard of this request for a blood test instead

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* Nor does Dewitt-Rickards' conduct meet the less stringent standards for finding a substantive due process violation. See Taylor v. Ledbetter, 818 F.2d 791, 795 (11th Cir. 1987) (en banc) (allegations of "gross negligence and deliberate indifference" are sufficient); Archie v. City of Racine, 847 F. 2d 1211, 1218-19 (7th Cir. 1988) (en banc) ("reckless" standard), cert. denied, 489 U.S. 1065 (1989).

of a breath test, we note that Grochowski testified that his request for the blood test came after he had elected the breathalyzer and was at the police station ready for the testing to begin. Although the police may be required to respect reasonable requests to undergo some other form of testing, Schmerber, 459 U.S. at 559 n.9, the request made in this case came too late. Had the officer decided to comply with Grochowski's request at that point, it would have meant transporting him to the hospital and allowing time to elapse which would, it would seem, influence the outcome of the blood test. See Schmerber, 384 U.S. at 770-71. Furthermore, the request was made only after the machine had been set up and the test was already in progress. A refusal under these circumstances is not reasonable.

As for the force complained of, Grochowski testified that he was held in

a chair by three police officers, while handcuffed, and that the lid to the testing device came down upon his head twice. He further complains that the officers taunted him by chanting "blow, blow, blow" while the test was being administered.

That the lid came down is admitted by both parties. However, there is no evidence tending to show that the lid was purposely dropped on his head. In fact, Grochowski testified that he was willing to cooperate and complete the test until the lid of the machine fell on his head twice as he attempted to perform the test. Thus, it is difficult to conclude that the lid was forced down on his head in an effort to make him submit to the test.

Even accepting Grochowski's testimony as true, the force used was not such that it "shocks the conscience." Since Grochowski has not presented evidence on which a jury could reasonably find in his favor,

Dewitt-Rickards is entitled to summary judgment on this claim. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986).

Similarly, Grochowski's due process claim premised on the failure of Dewitt-Rickards to follow Virgini'a statutory procedures dealing with a person's refusal to submit to a breath or blood test is without merit. Grochowski testified in state court that he initially elected to take a breath test. When he first expressed reservations about taking the test, one of the officers present began to explain his right to refuse the test, but Grochowski did not pursue this after being told he could not confer with a lawyer prior to deciding whether to refuse the test. Finally, when he again stated his desire not to submit to the breath test, he stated that he wished to take a blood test, but never voiced a blanket refusal to submit to any test. Since Virginia procedures relating to refusal to submit

to a blood or breath test apply only where there has been a refusal to submit to any test, see Va. Code Ann. §18-2-268, there was no reason for Dewitt-Rickards to follow those procedures based on Grochowski's version of the events. Thus, we need not decide the extent to which a liberty interest is created by Virginia's statutory scheme or the procedures necessary to protect that interest to conclude that Grochowski's claim is without merit.

For the foregoing reasons, the decision of the district court is affirmed. We dispense with oral argument because the fact and legal contentions are adequately presented in the material before the Court and argument would not aid in the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

ROMAN A. GROCHOWSKI, Plaintiff	)	CA NO. 89-0034-C
v.	)	O R D E R
COMMONWEALTH OF VIRGINIA, et. al., Defendants	)	JUDGE JAMES H. MICHAEL,JR.

Upon examination of the pleadings and other materials filed in this case, the court has considered defendant Thomas S. Dewitt-Rickhard's motion to dismiss as a motion for summary judgment. For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

that the motion for summary judgment shall be, and it hereby is granted. Accordingly, this case shall be, and hereby is, dismissed with prejudice and stricken from the docket of this court.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

Entered: JAMES MICHAEL,JR.
Judge

Date: July 18, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

ROMAN A.GROCHOWSKI, Plaintiff,	)	CA NO. 89-0034-C
v.	)	MEMORANDUM OPINION
COMMONWEALTH OF VIRGINIA, et. al., Defendants	)	Judge James H. Michael,Jr.

This action arose out of the arrest of the plaintiff, Roman A. Grochowski, by the defendant, Thomas S. DeWitt-Rickards. On August 25, 1987, Rickards arrested Grochowski for driving under the influence of alcohol, in violation of §18-2-266 of the Code of Virginia. Rickards conducted field sobriety tests at the scene of the arrest and, under the authority of Va. Code §18.2-268, transported Grochowski to the University of Virginia Police Department to administer a breathalyzer test. The resulting blood/alcohol content reading

was .11, and subsequently a magistrate issued an arrest warrant.

After the General District Court for the City of Charlottesville convicted Grochowski of driving under the influence of alcohol, he appealed to the Circuit Court for the City of Charlottesville for a trial de novo. Prior to the trial, Grochowski moved to suppress the results of the breathalyzer test on the basis that his right to refuse the test was abridged and that the test was tainted and forcibly coerced. In deciding the motion, the circuit court judge had before him the testimony introduced in the general district court trial. He ruled that, as a matter of law, Grochowski had not refused to take the test and thus the results were not inadmissible on that ground.

The jury in the circuit court convicted Grochowski of driving under the influence of alcohol. He then petitioned the Virginia

Court of Appeals, which denied his petition. That court also denied Grochowski's petition for rehearing. Although Grochowski filed a notice of appeal to the Supreme Court of Virginia, he did not actually file an appeal.

Grochowski is now before this court and claims that Rickards violated his fourth, fifth, and fourteenth amendment rights during the course of the arrest. Grochowski also charged Rickards with violating 42 U.S.C. §1983, alleging that he unconstitutionally applied the state statutory scheme for DUI offenses.

Rickards has moved to dismiss this action, asserting a lack of subject matter jurisdiction over plaintiff's claims and the plaintiff's failure to state a claim upon which the court can grant relief, under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), respectively. Both parties submitted briefs and presented oral argument

on June 19, 1990. Having considered documents outside the pleadings, the court treats this motion as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

The court first notes that if Grochowski is asking for a review of his state court criminal proceedings, this court clearly has no jurisdiction. A federal court cannot sit in appellate review of a final state court judgment. Rooker v. Fidelity Trust Co., 263 U.S. 413, 4150-16 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 477, 483 n.16 (1983). The plaintiff asserts that he is raising federal constitutional claims against the defendant and that he does not ask this court to review or set aside the conviction. A claim under 42 U.S.C. §1983 which challenges the legality of police conduct does not necessarily involve reviewing the validity of a criminal conviction. Haring v. Prosise,

462 U.S. 306 (1983). To the extent that the plaintiff's §1983 claim does not call into question the validity of his state court conviction, the Rooker-Feldman doctrine does not prevent this court from having subject matter jurisdiction over his claims. The court does note, however, that it cannot appropriately award the injunctive relief which Grochowski seeks. If this court enjoined the enforcement of the sentence imposed by the state court, it would essentially rule that the conviction was improper, and Feldman prohibits such action.

Although this court does have proper jurisdiction over the plaintiff's claims, it must next examine whether Grochowski has stated a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). The defendant asserts that Grochowski's claims are not sufficient because they are collaterally estopped by the state courts' proceedings. Grochowski

replies that he is raising federal constitutional claims and his §1983 claim for the first time in this court.

The rules governing collateral estoppel in 42 U.S.C. §1983 actions are clear. A state court judgment will preclude litigation of federal issues which the litigant could have raised in the state proceeding but did not if the state courts would give preclusive effect to the state court determination. Migra v. Warren City School District, 465 U.S. 75, 84-85 (1984). The Virginia Supreme Court defines collateral estoppel to preclude issues "previously litigated and essential to a valid and final judgment in the first case." Lake Monticello Service Co. v. Board of Supervisors of Fluvanna County, 233 VA 111, 114, 353 S.E.2d 767, 769 (1987) (citations omitted). In a §1983 context, the United States Supreme Court has interpreted Virginia law as giving preclusive effect to a state court conviction

only if the constitutional issue was actually litigated and necessarily determined in the state proceeding. Haring, 462 U.S. at 315. The Supreme Court noted in Haring, however, that if a motion to suppress evidence on constitutional grounds was considered at the state level, a state court determination on that issue could have preclusive effect. Id. at 311 n.2.

In order to determine whether Grochowski's criminal conviction in the state courts collaterally estops him from bringing a §1983 claim in federal court, the court must consider what issues of law and fact the state courts actually litigated or necessarily determined. To the extent that the state courts decided issues of fact or law which are related to Grochowski's federal claim, the doctrine of collateral estoppel would threaten his cause of action.

The criminal conviction is dispositive of two factual issues, necessarily determined

by the jury in its guilty verdict, which this court cannot ignore: that Grochowski was legally intoxicated and that he was driving an automobile. Neither of these issues of fact bar the plaintiff's claim that the defendant violated his constitutional rights.

The state courts also considered and determined an issue of law which does relate to Grochowski's present claims. By making a motion to suppress the breathalyzer test, the plaintiff raised the issue of the test's validity. Grochowski's assertion was that the officer did not administer the test in accordance with Va Code §18.2-268. When ruling on the motion, the circuit court judge had before him the transcript of the general district court proceeding, including the testimony of Grochowski and the officers involved in the arrest and administration of the test. Based on the officers' testimony

denying that Grochowski had refused to take the test, the circuit court concluded, as a matter of law, that Grochowski "never refused to take the test." Commonwealth v. Grochowski, No. 88-26 (16th Cir. Ct. V.A.) (Letter opinion of Judge Herbert A. Pickford). Consequently, the test results were not inadmissible on the grounds that the test was invalid. That Grochowski did not refuse the test is a legal issue which was essential to the circuit court's ruling on the motion to suppress.

The plaintiff claims that the circuit court denied the motion to suppress before it heard the officers' testimony corroborating his denial to take the breathalyzer test. For example, he points to the fact that during the circuit court trial the officers said Grochowski would not blow into the machine and that they had to hold him still while he took the test.

The court does not find that the denial of the motion, and the legal conclusions implicit therein, are any less valid given the testiony during the second trial. Although the officers' testimony might have been somewhat different in the circuit court, no substantial differences exist. [1] In addition, the plaintiff's motion

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1 The transcript from the general district court included the officers' statements that Grochowski never refused the test, a position they reasserted in the circuit court, and that Grochowski was uncooperative while taking the test, again consistent with their statements in the circuit court that he would not blow into the breathalyzer machine.

to suppress included his assetions that he had refused the test, the test was forcibly coerced and tainted, and his right to refuse the test was abridged. This court finds no significant difference between the information before the circuit court on the motion to suppress and the subsequent testimony at the trial.

Even if a consequential disparity existed, and the denial of the suppression motion was improper, the Virginia Court of Appeals certainly had all the evidence before it in Grochowski's petition for appeal. In denying the petition, the appellate court stated that "The trial court did not err in finding that the appellant had not refused to take the breathalyzer test." Order of the Court of Appeals of Virginia, May 26, 1989. This court cannot ignore the state court's definitive ruling that Grochowski voluntarily took the breath test.

The improper administration of the test is the at heart of the plaintiff's claims in federal court. [2] Because this court must give credence to the state court's conclusion that Grochowski voluntarily took the test, the issue of force in the administration of the test is precluded.

In addition, the fact that the test was voluntary negates the claim that Rickards ignored Grochowski's constitutional rights while administering the test. The plaintiff did not specifically raise fourth, fifth, or fourteenth amendment claims in the state court proceedings. However, his present

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2 As Grochowski's counsel admitted at oral argument, the underlying basis for the plaintiff's constitutional and § 1983 claims is that his rights were ignored given the undue violence Rickards used at the police station in forcing him to take the test.

claims that Rickards violated his rights against self-incrimination and substantive due process hinge upon the administration of the breath test.

Although he correctly admit that blood alcohol level tests do not jeopardize a person's fifth amendment rights,[3] Grochowski maintains that his case falls into a possible exception the United States Supreme Court left open in Schmerber and mentioned again in South Dakota v. Melville, 459 U.S. 559

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3 See Schmerber v. California, 384 U.S. 757 (1966) (State-compelled blood alcohol test does not infringe upon the right against self-incrimination).

(1983).[4] Specifically, he claims that his case implicates due process concerns because Rickards used inappropriate force during the administration of a breath test, thus raising a question of whether the fifth amendment right applies. Once again, the state court's ruling that the officers did not force Grochowski to take the test collaterally estops this court from determining that Rickards used excessive force in administering the test.

The court draws the same conclusion about the plaintiff's fourth and fourteenth amendment due process claims. Under the

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[4] In Melville, the Court noted "Schmerber did caution that due process concerns could be involved if the police initiated physical violence while administering the test, refused to respect a reasonable request to undergo a different form of testing, 459 U.S. 553, 559 n.9 (citing Schmerber, 384 U.S. at 760, n.4.)

applicable state statute, the defendant has a right to refuse the breath test and opt instead for a blood test. Va. Code §18.2-268(C). In his motion to suppress in the state court proceedings, Grochowski argued that his refusal to take the test made the certificate inadmissible and that his right to refuse the test must be enforced. He also argued that the test was tainted. By allowing the results of the test to be admitted into evidence, the state court necessarily determined that the officers complied with the state statutory scheme governing blood alcohol tests. Grochowski cannot relitigate the protection of his due process rights in federal court.

In a final attempt to circumvent the application of collateral estoppel, Grochowski refers to the Supreme Court's statement in Allen that if the state court demonstrated inability or unwillingness to protect federal rights in a § 1983 action,

a state court conclusion will not be given preclusive effect. Allen, 449 U.S. at 101. The ninth circuit decision with which the plaintiff compares his own case, Robinson v. Ariyoshi, 753 f.2d 1468 (9th Cir. 1985), indeed allowed the federal court to hear constitutional arguments which the state courts failed to entertain. That case is easily distinguished, however, because the federal district court was asked "to make findings about constitutional claims which themselves were never decided by a state court, intertwined or otherwise." Id. at 1473. As discussed, the constitutional claims Grochowski raises have been essentially decided in the state court proceedings. Finally, this court finds plaintiff's contention that the Virginia state courts "demonstrated an inability to protect any constitutional rights obviously seeing no rise of the issue of a constitutional level" without merit. See Plaintiff's Brief in

Opposition to Defendant's Thomas S. Dewitt-Rickards' Motion to Dismiss at 11. Both the motion to suppress and petition for appeal raised issues of due process and the defendant's use of excessive force.[5] Although Grochowski did not label his objections "constitutional," the circuit court and the Virginia Court of Appeals, on sufficient evidence, concluded the Grochowski's rights had not been violated. The days of suspicion and distrust of a

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5 For example, in his petition for appeal, Grochowski claimed that "The police involved ... abridged [the accused's rights]", Petition for Appeal at 18, Grochowski v. Commonwealth, compelled to give as 'evidence' against himself a breath test ..." Id. at 20; and that he "requested to be advised of his rights and to take a blood test. These were not afforded him and are substantive rights ... It is submitted a substantive right was violated as a matter of law." Id. at 36.

state court's capability to protect federal rights are long gone. [6] This court has no reason to believe that the Virginia judicial system did not fairly and competently adjudicate the relevant issues in this case.

Accordingly, the court finds that the state court criminal proceedings bar a hearing of Grochowski's claims. Rickards' motion for summary judgment is therefore granted.

Entered: James H. Michael,Jr.
Judge

Date : July 18, 1990

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[6] See Allen v. McCurry, 449 U.S. 105 (1980) (citing Stone v. Powell, 428 U.S. 465, 493-94 n. 35 (1976)).

Supreme Court, U.S.
FILED
JUL 31 1991
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(2)

No. 91-68

In The

Supreme Court of the United States

October Term, 1991

ROMAN A. GROCHOWSKI,

Petitioner,

vs.

T.S. DEWITT-RICKARDS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondent, pursuant to Rule 34.1(a) and .2 of the Rules of the Supreme Court of the United States, asserts that petitioner's statement of questions presented is misleading and confusing, and offers the following alternative:

Did the Fourth Circuit Court of Appeals err in ruling that there was no violation of the Fourth, Fifth or Fourteenth Amendments to the United States Constitution where the force used by respondent to extract from petitioner breath analysis evidence of intoxication, pursuant to the Virginia statutory scheme, caused no more than minor discomfort to petitioner?

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No. 91-68

In The

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ROMAN A. GROCHOWSKI,

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T.S. DEWITT-RICKARDS,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF CASE

Petitioner Grochowski filed his Complaint on August 25, 1989, alleging that respondent Dewitt-Rickards, a police officer for the City of Charlottesville, Virginia, violated his rights protected by the Fourth, Fifth and Fourteenth Amendments during an arrest for driving while intoxicated. Grochowski alleged that

he had a statutory right to refuse a breath analysis of blood alcohol, but that respondent coerced by excessive force Grochowski's submission to the breathalyzer.

Respondent answered and filed an affidavit from the Commonwealth attorney including Grochowski's traffic trial testimony and the record of appeal of his criminal conviction, which conviction was upheld in the state appeals court. The federal district court granted summary judgment for respondent, holding that the criminal conviction required a finding that the evidence was not unconstitutionally collected, thereby collaterally estopping the civil action. The Court of Appeals disagreed, but held that summary judgment for respondent nonetheless was appropriate on the merits.

The Fourth Circuit held that Grochowski consented to a breathalyzer test after being detained on suspicion of driving while intoxicated (Appendix to Petition at 14). He was taken to the stationhouse for purposes of the test without violent incident (Petition at 8).

At the stationhouse, Grochowski fell while stepping from the police car, through no fault or cause of the officers, injuring his head (P9). After the breathalyzer was set up, warmed up, and the test was in progress, Grochowski declared he would rather go to the hospital for a blood test (App. 14). The officers declined the request, held Grochowski in a chair, and admonished him to blow into the machine (App. 15). During the test, the machine's lid twice fell on Grochowski's head, although there is no allegation he was thereby injured (P10). The blood alcohol reading was .11, in excess of the statutory limit of .10. (App. 21).

The Court of Appeals, even resolving all factual disputes in Grochowski's favor (App. 11), found that Grochowski voluntarily consented to the breath analysis. The "minor force" used by

respondent caused no more than "minor discomfort on the part of the complaining party." (App. 12, 13).

Respondent urges upon this Court that the unpublished opinion of the Court of Appeals properly applied the facts and the law, that the court below decided no federal questions in a way in conflict with applicable decisions of this Court, and that the Petition filed herein should be denied.

REASON FOR DENYING THE PETITION

THE FORCE ALLEGEDLY EMPLOYED BY RESPONDENT WAS NOT UNCONSTITUTIONALLY EXCESSIVE.

Grochowski brings his action pursuant to 42 U.S.C. § 1983, claiming that his constitutional rights were violated following his detention for driving while intoxicated and the subsequent administration of a breathalyzer examination to confirm intoxication. The appropriate standard to review respondent's actions depends upon the particular constitutional right allegedly infringed by the application of excessive force. *Graham v. Connor,* 490 U.S. 386 (1989). The Petition fails to distinguish clearly each right and standard implicated in this case.

Petitioner claims that his detention by police and submission to a breathalyzer test violated his Fourteenth Amendment due process rights, because excessive force was used to coerce the test. He argues that the police conduct should be reviewed with respect to "whether or not the police actions impermissibly encumbered Grochowski's legislated right of refusal." (P22). This is not a constitutional issue.

A state legitimately may compel a driver to submit to a blood-alcohol test against his will. *South Dakota v. Neville,* 459 U.S.

553, 563 (1983). The Fourteenth Amendment is not implicated unless the method used to extract the evidence offends that "sense of justice" described in *Rochin v. California,* 342 U.S. 165 (1952). In the instant case, Grochowski elected to take the test, "never voiced a blanket refusal to submit to any test," and only requested a blood test after the breathalyzer lid fell on his head (App. 16-17). Since Grochowski was not forced to take the test, there was no need to engage in Fourteenth Amendment analysis of the degree of force.

Even applying due process analysis, the police activity involved cannot be characterized as "inappropriate force."[1] *See Schmerber v. State of California,* 384 U.S. 757, 760, n. 4 (1966). Further, given a specific Fourth Amendment challenge to the force alleged, a more generalized due process analysis is inappropriate. *See Graham,* 490 U.S. at 394.

Grochowski seems to concede that the Fifth Amendment confers no constitutional right to be free from a breathalyzer test for driving while intoxicated. He instead argues that the Fifth Amendment is implicated through the Fourth Amendment if the police, in taking him into custody and administering the test to collect evidence, employ excessive force.

Grochowski did not articulate below the *Graham* standard he now contends should have been employed. In his brief to the Court of Appeals he argued that he was "compelled" by the police to submit to the test, by their admonitions to "blow, blow, blow," in violation of the Fifth Amendment. He further argued that the test was not administered in a "reasonable manner," citing *Schmerber, supra,* but not *Graham.* He should not be allowed

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1. For due process clause purposes, "inappropriate" force is that which "shocks the conscience" and offends "even hardened sensibilities." *Rochin v. People of California,* 342 U.S. 165, 169-72 (1952).

to petition this Court to review a decision below on grounds different from those upon which he previously relied. *Youakim v. Miller,* 425 U.S. 231, 234 (1976).

Regardless, the decision of the Court of Appeals should stand. Factually, the court had before it the affidavit of the Commonwealth's attorney and the criminal trial testimony of Grochowski and the respondent officer. Grochowski relied upon the mere allegations of his pleadings. *See* F.R.C.P. 56(e). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

The facts in this case simply could not lead to a verdict for petitioner. Those facts plainly contradict the claim of a violation of the *Graham* "objective reasonableness" test. Grochowski does not allege that the seizure of his person for driving under the influence of alcohol was accompanied by force. Nor does he allege that the respondent pushed, tripped or otherwise caused him to fall at the time of arrival at the stationhouse. He did fall, but concedes it was independent and accidental (P9). All he alleges is that the officers held him in a chair at the breathalyzer machine, admonished him to blow into it, and in the process the wooden lid of the machine accidentally fell on his head. "There is no evidence tending to show that the lid was purposely dropped on his head." (App. 15).

Assuming that the Fourth Amendment even attaches to the breathalyzer test, administered after Grochowski was non- violently taken into custody,[2] there was no evidence of excessive force.

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2. *Graham v. Connor,* 490 U.S. at 395, n. 10 specifically reserves the "question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins."

As this Court stated in *Graham*:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . .
>
> "Not every push or shove, even if it may later seem, unnecessary in the peace of a judge's chambers" . . . .violates the Fourth Amendment . . . .
>
> As in other Fourth Amendment contexts . . . the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

490 U.S. at 396, citations omitted.

In determining whether conduct is so "unreasonable" as to be unconstitutional, "we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985). This Court has already recognized the compelling interest in highway safety, especially in the context of the drunk driver. *See South Dakota v. Neville*, 459 U.S. 553 (1983); *Mackey v. Montrym*, 443 U.S. 1 (1979); *Breithaupt v. Abram*, 352 U.S. 432 (1957).

Just as the governmental interest is compelling, the nature and quality of the intrusion against Grochowski was *de minimus*.

The circuit courts, before and after *Graham*, have recognized that, to be unconstitutional, the force and injury must be severe. *See, e.g., Dean v. City of Worcester,* 924 F.2d 364 (1st Cir. 1991) (where plaintiff was pushed face-first onto sidewalk, gun placed to his ear, feet kicked, he was tightly handcuffed, then pushed against a wall causing him to suffer a cut to his scalp, summary judgment was affirmed for the police officers); *Foster v. Metropolitan Airports Com'n,* 914 F.2d 1076 (8th Cir. 1990) (pushing plaintiff against a wall twice while handcuffed not so unreasonable as to give rise to a constitutional claim of excessive force); *Raley v. Fraser,* 747 F.2d 287 (5th Cir. 1984) (even where police applied choke holds four times, plaintiff's "arms were bruised, his face scraped, and the handcuffs raised welts on his wrists," force used was not unreasonable).

The Fifth Circuit has held that a plaintiff can prevail on a constitutional excessive force claim only by proving each of three elements:

> (1) a significant injury, which
>
> (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was
>
> (3) objectively unreasonable.

Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989). Applying this test to Grochowski's arrest, it is evident that he did not suffer a significant injury.[3] Indeed, there was no injury from the wooden

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3. Even if the concussion petitioner allegedly suffered were significant, which respondent denies, it did not result from any force exerted by respondent, but rather occurred when Grochowski accidentally and independently fell.

lid of the breathalyzer, and no evidence that respondent caused it to strike Grochowski. Thus, respondent's conduct could not be unreasonable.

CONCLUSION

The Fourth Circuit Court of Appeals correctly granted summary judgment for the respondent Officer DeWitt-Rickards. There is no evidence of excessive or unreasonable force resulting in significant injury to Grochowski. There is no constitutional issue worthy of review by the Supreme Court of the United States. The Petition should be denied, and final judgment entered for respondent.

Respectfully submitted,

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